

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

SAFETY RESEARCH & STRATEGIES, INC.)
340 Anawan Street)
Rehoboth, MA 02769,)

Plaintiff,)

v.)

Civil Action No.

U.S. DEPARTMENT OF TRANSPORTATION)
400 Seventh Street, S.W.)
Washington, DC 20590,)

Defendant.)

COMPLAINT FOR INJUNCTIVE RELIEF

1. This is an action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, for injunctive and other appropriate relief and seeking the disclosure and release of agency records improperly withheld from plaintiff by defendant U.S. Department of Transportation and its component, the Federal Highway Administration.

Jurisdiction and Venue

2. This Court has both subject matter jurisdiction over this action and personal jurisdiction over the parties pursuant to 5 U.S.C. § 552(a)(4)(B). This court also has jurisdiction over this action pursuant to 28 U.S.C. § 1331. Venue lies in this district under 5 U.S.C. § 552(a)(4)(B).

Parties

3. Plaintiff Safety Research & Strategies, Inc. (“SRS”) is a Massachusetts company specializing in motor vehicle and product safety research, investigation and advocacy. SRS’s clients include attorneys, engineering firms, supplier companies, media, and government. SRS works with organizations and entities interested in improving vehicle and product safety. The company’s advocacy mission includes the publication of special reports, articles and

investigations and submissions to safety agencies and policymakers on matters of public interest. Much of SRS's advocacy work is performed on a *pro bono* basis.

4. Defendant U.S. Department of Transportation ("DOT") is a department of the Executive Branch of the United States Government and includes as a component the Federal Highway Administration ("FHWA"). DOT is an agency within the meaning of 5 U.S.C. § 552(f).

Safety Concerns Surrounding Trinity Industries' Guardrail Systems

5. Dallas, Texas-based Trinity Industries, Inc. dominates the global highway guardrail market, and its guardrail end-terminals are installed on highways across the United States. In the late 1990s, Trinity launched the ET-Plus, a guardrail end-terminal system, also known as an Energy Absorbing Terminal, that is designed to absorb the kinetic energy of the striking vehicle in an impact. Once the end-terminal head is impacted, it is designed to extrude through a feeder chute, flattening the rail, or W-beam, which exits through the terminal head like a metal ribbon, dissipating the crash energy and bringing the vehicle safely to a halt. FHWA first approved the ET-Plus in 1999.

6. In 2005, Trinity made a design change to the ET-Plus terminal extruder head (from 5" to 4"), likely to save material and manufacturing costs. The newer version of the ET-Plus, manufactured in 2005, also has a dimensional change to the height of the extruder head, through which the rail is extruded. This change may cause the rails to hang or lock up in the extruder head, feeder chute or channel. Instead of ribboning out, as originally designed, the rail allegedly folds back to form a spear, intruding into the vehicle and potentially impaling its occupants.

7. While the alleged failures of the 4" extruder head terminal system have been the subject of media and state government agency inquiries, there are other performance anomalies

associated with both the 5” and 4” terminal head designs of the ET-Plus, raising potential concerns about overall design of this product, from its inception.

8. Further, Trinity changed the design of the end terminal without specifically notifying FHWA, as required by federal law, until seven years later, when a patent dispute between Trinity and SPIG Industries, of Bristol, Virginia brought this modification to light.

9. In the last two years, questions about the safety and field performance of the ET-Plus have been raised by state departments of transportation individually and via the American Association of State Highway and Transportation Officials (“AASHTO”). In the fall of 2012, three of its 21 members responded to a survey about the field performance of guardrail terminals indicating that the end terminals were involved in three severe vehicle crashes that resulted in serious injuries and deaths; two of the three agencies specifically referenced the ET-Plus. AASHTO asked FHWA to re-review its approval of the ET-Plus and document the modified barrier system’s crashworthiness under the federal criteria, NCHRP 350. More recently, in January 2014, the Nevada Department of Transportation informed Trinity that its ET-Plus terminal would no longer be considered approved equipment because of the 2005 modification that was not disclosed. Trinity was required to inform the state of the product modifications and failed to do so.

10. Safety questions concerning Trinity guardrails have been the subject of numerous news stories in the U.S. and abroad, giving the issue a high profile. To journalists, FHWA has claimed that the controversy is a business dispute between competitors. Internally, however, documents suggest that officials within the agency have admitted that there are valid field performance issues with these products.

Plaintiff's FOIA Requests and FHWA's Denial of Access

ET-2000 FOIA Request

11. By letter to FHWA dated November 7, 2013, plaintiff submitted a FOIA request seeking agency records relating to the ET-Plus and/or ET-2000 highway guardrail systems (hereinafter referred to as the "ET-2000 request"). Specifically, plaintiff requested the following records:

- 1) Any and all testing conducted by your agency or on behalf of your agency from 1990 to the present related to the design and/or development of the ET- 2000 and ET-Plus guardrail systems;
- 2) Any and all testing conducted by Trinity or on behalf of Trinity and provided to your agency in draft and/or final form related to the ET-Plus guardrail system;
- 3) Any and all inquires and/or investigations conducted by your agency of the ET-Plus guardrail system from 1990 to the present;
- 4) Any and all logs, minutes and/or attendance sheets regarding meetings held with Trinity, Texas A & M and/or any entity or individual specific to the design, development and/or performance to include product failures of the ET-Plus guardrail system from 1990 to the present;
- 5) Any and all test reports and/or video or similar media obtained from Texas A & M regarding the ET-Plus guardrail system;
- 6) Any and all documents regarding the certification, approval and/or acceptance of the ET-Plus guardrail system;
- 7) Any and all design and/or specification documents related to the ET-plus system from 1990 to the present;
- 8) Any and all communications with Trinity regarding any and all Texas A & M testing conducted of the ET-Plus guardrail system from 1990 to the present;
- 9) Any and all communications with Texas A & M regarding any testing of the ET-Plus guardrail system from 1990 to the present;
- 10) Any and all communications with Trinity that pertains the National Cooperative Highway Research Program (NCHRP) Report 350 "Recommended Procedures for the Safety Performance Evaluation of Highway Features" including but not limited to documents exchanged during the evaluation of the device and the acceptance process and specifically related to any and all ET-plus highway guardrail safety systems from 1990 to the present;

11) Any and all compliance and/or enforcement records and/or reports related to the ET-Plus guardrail system;

12) Any and all communications between Nicholas Artimovich and any representative of Trinity related to the design, development, performance and/or failures of any and all ET-Plus guardrail system;

13) Any and all communications between the Office of Safety Design and Trinity regarding the safety and/or performance of the ET-plus guardrail system from 1990 to the present;

14) Any and all documents depicting and/or explaining any and all modifications of the ET-Plus guardrail system from 1990 to the present;

15) Any and all documents and/or correspondence between your agency and Joshua Harman pertaining to the ET-Plus guardrail system; and

16) Any and all comments to any FHWA regulatory docket related to highway safety systems such as guardrails and end terminals/caps submitted by Trinity or on behalf of Trinity and specifically related to the ET-Plus guardrail system.

12. By letter to plaintiff dated January 30, 2014, FHWA made a partial response to the ET-2000 request. FHWA stated that “[w]e have no records responsive to [items] 1, 3, 11 and 16.” FHWA released records in response to items 2, 5, 6 and 7 of the ET-2000 request. FHWA stated that “a follow up response is forthcoming.”

13. By letter to plaintiff dated February 19, 2014, FHWA issued a final response to the ET-2000 request. FHWA provided to plaintiff “[r]ecords responsive to [items] 8, 9, 10, 12, 13, 14 and 15” of the request. FHWA stated that it “does not collect the information requested in item 4” of the request. FHWA further stated that, in reliance upon Exemption 5 of the FOIA, 375 pages of responsive material were withheld in their entirety and “[a]pproximately 19 pages have been partially withheld.” FHWA advised plaintiff that it could appeal the determination the agency had made in response to the ET-2000 request.

14. By letter to FHWA's Associate Administrator for Administration dated March 18, 2014, plaintiff appealed the agency's denial of its ET-2000 FOIA request. The agency received plaintiff's administrative appeal on March 18, 2014.

15. To date, the agency has not made a determination on plaintiff's appeal concerning the ET-2000 FOIA request.

AASHTO FOIA Request

16. By letter to FHWA dated December 9, 2013, plaintiff submitted a FOIA request seeking agency records relating to the American Association of State Highway Officials (hereinafter referred to as the "AASHTO request"). Specifically, plaintiff requested the following records:

- 1) The 2012 Informal Survey conducted by American Association of State Highway and Transportation Officials (AASHTO) sent to the Technical Committee on Roadside Safety that represented that 3 of the 21 member agencies stated that the ET-Plus system was involved in crashes involving serious injury and/or death;
- 2) Any and all communications and/or correspondence with AASHTO regarding the ET-Plus guardrail system and/or in response to their letter to FHWA dated December 14, 2012;
- 3) Any and all documents related to any and all matters addressed in FHWA's January 10, 2013 letter to AASHTO and in reference to HS5T;
- 4) Any and all communications and/or correspondence with Trinity Industries related to the AASHTO letter dated December 14, 2012;
- 5) Meeting minutes and/or documents, presentation from the 2011 meeting related to the AASHTO Technical Committee on Roadside Safety in which the committee considered the NCHRP research proposal, "In Service Evaluation of End Terminals;" and
- 6) The research proposal in draft and or final form entitled, "In Service Evaluation of End Terminals" as well as any and all supporting and/or referenced documentation.

17. By letter to plaintiff dated January 24, 2014, FHWA issued a final response to the AASHTO request. FHWA provided to plaintiff “[r]ecords responsive to items 1, 2, 5 and 6” of the request. FHWA stated that “[t]he request in item 3 lacks reasonable specificity regarding the records sought.” FHWA further stated that “[r]egarding [item] number 4, we have no responsive records.” FHWA advised plaintiff that it could appeal the determination the agency had made in response to the AASHTO request.

18. By letter to FHWA’s Associate Administrator for Administration dated February 21, 2014, plaintiff appealed the agency’s denial of its AASHTO FOIA request. The agency received plaintiff’s administrative appeal on February 24, 2014.

19. To date, the agency has not made a determination on plaintiff’s appeal concerning the AASHTO FOIA request.

20. Plaintiff has exhausted the applicable administrative remedies with respect to the ET-2000 and AASHTO FOIA requests.

21. Defendant DOT and its component, FHWA, have wrongfully withheld the requested records from plaintiff.

Requested Relief

WHEREFORE, plaintiff prays that this Court:

- A. order defendant DOT and its component, FHWA, to disclose the requested records in their entirety and make copies available to plaintiff;
- B. provide for expeditious proceedings in this action;
- C. award plaintiff its costs and reasonable attorneys fees incurred in this action; and
- D. grant such other relief as the Court may deem just and proper.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "David L. Sobel", written over a horizontal line.

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